

HON'BLE SRI JUSTICE S. RAVI KUMAR

C.M.A.No.2622 of 2000 & C.R.P.No.3143 of 2004

COMMON ORDER:

C.M.A.No.2622 is preferred against order dated 10.08.2000 in I.A.No.386 of 1999 in O.S.No.26 of 1977, whereunder, the Court below allowed petition filed under Order IX Rule 13 CPC to set aside preliminary decree dated 30.11.1980.

2. C.R.P.No.3143 of 2004 is preferred against order in I.A.No.387 of 1999 in O.S.No.26 of 1977 dated 10.08.2000, whereunder, trial Court allowed application filed under Order 1 Rule 10 CPC permitting R-1 herein to be impleaded as D-5 in the suit O.S.No.26 of 1977.

3. Brief facts leading to this revision and appeal are as follows:

Appellant and revision petitioner herein filed O.S.No.26 of 1977 for partition and the same was decreed on 30.11.1980 on contest and a preliminary decree was passed. In pursuance of the said decree, plaintiff filed I.A.No.1157 of 1981 for passing final decree and when final decree petition was at the stage of disposal, R-1 herein filed I.A.No.386 of 1999 to set aside the preliminary decree dated 30.11.1980 and filed I.A. No.381 of 1999 to implead him as D-5 in O.S.No.26 of 1977 and the trial Court allowed both the applications. Aggrieved by the

same, appeal and revision are preferred.

3. Heard arguments.

4. Advocate for appellant/revision petitioner submitted that the suit O.S.No.26 of 1977 is decided on merits, therefore the application under Order IX Rule 13 CPC to set aside ex parte decree is not at all maintainable. He submitted when a specific ground as to maintainability is taken in the counter, the trial Court without answering that point simply allowed application on the premise that it is an ex parte decree. He further submitted that the learned trial judge mainly relied on a decision of this Court reported in A.P.L.J.1976 (1) (H.C.), but the principle laid down in the above decision is not at all disputed, according to which, I.A.No.1157 of 1981 filed for passing of final decree is to be treated as continuation of proceedings in O.S.No.26 of 1977. When R-1 herein was already impleaded as a party to the said I.A.No.1157 of 1981, he can as well put forth his objection and agitate for his rights in the said application, for that reason, reopening of suit or setting aside preliminary decree is not legal. He submitted that trial Court has not properly understood the principle laid down in the above referred decision, therefore, order of the trial judge is liable to be set aside.

5. No arguments are advanced on behalf of

respondents.

6. Now the point that would arise for my consideration is :

“Whether the order of trial Court is legal, correct and proper?”

POINT:

7. There is no dispute with regard to passing of preliminary decree in O.S.No.26 of 1977 on 30.11.1980 because that decree is not an ex parte decree and it is on contest. R-1 herein filed two applications, one is to implead him as a party to O.S.No.26 of 1977 and other is to set aside the decree by invoking order IX Rule 13 CPC.

8. Admittedly, the provisions of Order IX Rule 13 CPC are available to a party against whom an ex parte decree is passed. When, R-1 claims that he is not a party to the suit and he has to be impleaded as a party as per the provisions of Order I Rule 10 CPC, his application under Order IX Rule 13 CPC is not maintainable because according to his own version, he is not a party to the suit. A third party cannot invoke provisions of Order IX Rule 13 and in that way, I.A.No.387 of 199 is not maintainable.

8. The application under Order IX Rule 13 CPC is not maintainable for another reason because it is not an ex parte decree and it is a decree on merits. But the trial

Court lost sight of this aspect and simply carried away with the plea of R-1, and allowed the application.

9. With regard to the second application filed under Order 1 Rule 10 CPC, the trial judge by taking aid from a decision of this Court in APLJ 1976 (1) (H.C) referred to above, accepted the request of R-1 herein. There is no dispute with regard to principle formulated in the above decision that final decree proceedings are continuation of suit, and provisions of Order 1 Rule 10 can be applied to final decree proceedings also. In fact, as seen from the material, R-1 herein has already invoked the provisions of Order 1 Rule 10 in the final decree proceedings and got himself impleaded as a party there. When he is impleaded as a party, he can as well protect his right by participating in the final decree proceedings and the Court has to consider the objection of R-1 in the final decree proceedings, if these pleas are legal and lawful. The learned trial judge misunderstood the purport of principle laid down in the above decision that resulted in passing of impugned order under challenge.

10. On a scrutiny of the material, I am of the view that learned trial judge committed grave error in allowing both the I.As., and therefore, the impugned order dated 10.08.2000 is liable to be set aside.

11. Accordingly, the Civil Revision Petition is allowed and impugned order dated 10.08.2000 is set aside and

the Civil Miscellaneous Appeal is also allowed giving liberty to R-1 to agitate his rights in I.A.No.1157 of 1981 and the Court below shall consider the objection of R-1 herein in accordance with law.

Miscellaneous petitions, if any pending, in this revision petition and appeal shall stand closed.

S. RAVI KUMAR, J

Date: 25-02-2015

gvl